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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

P.M. BERGH, et al.,

Petitioners,

vs.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether by "settling" the appeals of certain air traffic controllers fired for striking the government may reinstate such employees without giving reasons, thus avoiding the Merit Systems rules which require equal treatment of disciplined employees.

II. Whether a federal court of appeals may rely on an "explanation" in an appellate brief in lieu of evidence to carry an agency's burden of proof.

III. Whether discipline imposed by an agency under the impression that such discipline was required by 5 USC § 7311 may be upheld on the ground that such discipline was within the discretion of the agency to impose, though the agency never exercised its discretion. Whether 5 USC § 7311 requires discharge of any government employee found to have participated in a strike.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issued to review the decision of the United States Court of Appeals for the Federal Circuit dated July 2, 1986.

OPINIONS BELOW

The United States Court of Appeals for

the Federal Circuit affirmed the decision of the Merit Systems Protection Board (MSPB) in these consolidated air traffic controller appeals. The MSPB decisions in these cases affirmed some of the decisions rendered by various presiding officials in the Pacific Northwest and reversed others, with the result that Respondents' decisions to discharge Petitioners were upheld in all cases.

The Court of Appeals decision is reported at 794 F.2d 1575 (Fed. Cir. 1986). The MSPB decisions are reported at 17 MSPR 62 (1983) and 17 MSPR 119 (1983). The presiding officials' decisions are unreported.

JURISDICTION

The Court of Appeals' decision was issued July 2, 1986, and judgment entered on that decision the same date. This court has jurisdiction under 28 USC § 1254 (1).

STATUTES INVOLVED

Title V, United State Code, Section 2301(b) provides, in relevant part:

> Federal personnel management should be implemented consistent with the following merit system principles:
>
> * * *
>
> (2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management...
>
> * * *
>
> (8) Employees should be --
>
> (A) Protected against arbitrary action, personal favoritism, or coercion for partisan political purposes,...

5 USC § 2301.

Title V, United States Code, Section 7703 (c) provides as follows:

> In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency actions, findings, or conclusions found to be --

> arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;...

5 USC § 7703.

Title V United States Code, Section 7311 provides:

> An individual may not accept or hold a position in the Government of the United States...if he --
>
> * * *
>
> (3) participates in a strike, or asserts the right to strike against the Government of the United States...

5 USC § 7311.

STATEMENT OF THE CASE

Petitioners are former air traffic control specialists, who were employed by the Federal Aviation Administration (hereinafter "FAA" or "Agency"). In August, 1981, Petitioners were charged with participating in a strike and unauthorized absence. In August and September, 1981, Petitioners were

removed from their employment. The FAA never considered any penalty other than removal from employment for those it found had participated in the strike. E.g. Exhibit 94 at 137-38 (Stipulation of Agency counsel). The Agency never exercised any discretion with respect to the penalty but simply removed all those it believed had participated in the strike.

After Petitioners were removed, they, and thousands of other air traffic controllers, filed timely appeals with the MSPB. Before hearings were held in Petitioners' cases, the FAA agreed to reinstate some of the controllers it had fired for striking. The parties stipulated below that:

> The FAA nationwide has reinstated some air traffic controllers/appellants who were removed for participation in the 1981 strike pursuant to settlement agreement. The identity of these controllers and their date of

reinstatement is known to the FAA. E.g., Troutdale Tower Stipulation, No. 41. For example, Seattle region controllers Steven D. Klapstein and Robert E. Womeldorff were reinstated at some time before September 22, 1982. Mr. Klapstein was reinstated to the Portland, Oregon tower August 23, 1982. Exhibit 608. The evidence was uncontradicted that Mr. Klapstein did participate in the August, 1981 strike. Portland Transcript at 33, 203; Exhibits LL, NN (picket line photographs).

Petitioners contended before the MSPB presiding officials that the favored treatment received by those controllers who were reinstated violated Merit Systems principles of equal treatment and that, under well-established MSPB holdings, the government had the burden to prove a legitimate reason for this disparate treatment. The presiding officials held that

the statute which prohibits strikes by government employees requires that any striking employee be fired and therefore rejected Petitioners' contention.[1] Title V, United States Code, Section 7311 provides, in relevant part:

> An individual may not accept and hold a position in the Government of the United States or the government of the District of Columbia if he ---
>
> * * *
>
> (3) Participates in a strike or asserts the right to strike, against the Government of the United States or the government of the District of Columbia;...

5 USC § 7311.

Petitioners timely requested review by

---

[1] Petitioners' consolidated appeals were heard initially by two presiding officials. Presiding Official John Tapp ruled as above, that 5 USC § 7311 requires that any striking government employee be fired. Presiding Official Carol Teather did not address Petitioners' contention.

the MSPB. The MSPB declined to rule as to whether 5 USC § 7311 required removal of striking employees but affirmed the presiding officials' decisions on the ground that disparate treatment, considered as a mitigating factor, was not sufficient to require reversal of the presiding officials' decision. The Board also noted the public policy favoring settlement of disputes. Herbert vs. FAA, 17 MSPR 62, 70 (1983).

Petitioners also argued to the Board that the Agency had erroneously considered 5 USC § 7311 to require their removal for participation in a strike. As to this contention, the Board simply relied on its decision in Schapansky vs. Department of Transportation, 13 MSPR 589 (1982), which held that removal is within the permissible range of penalties for striking, thus would not be reversed. The Board did not address Petitioners' contention that the Agency's

decision could not be upheld as an exercise of discretion since the Agency never exercised its discretion.

Petitioners requested review in the Federal Circuit Court of Appeals. The Court of Appeals upheld the MSPB decision, though on grounds different from those relied on by the Board or the presiding officials. The Court of Appeals held that the requirements of the Civil Service Reform Act of 1978 for equal treatment of employees do not apply to agency reversals of penalties previously imposed. Bergh vs. Department of Transportation, 794 F.2d 1575, 1577 (Fed. Cir. 1986). The Court found the reinstatement of Messrs. Klapstein and Womeldorff to be "settlement" of pending litigation, not the imposition of different penalties.

In addition, the Court noted the following "explanation" which the

government's counsel made in the government's brief to the Court of Appeals:

> The FAA conducted an in-depth analysis of each of the 11,000 cases of the removed air traffic controllers in preparation for the litigation before the MSPB. As part of the litigation strategy, the FAA undertook an analysis of the strengths and weaknesses of each case. Based on this individualized analysis, the agency made decisions to enter into settlement negotiations with certain air traffic controllers whose appeals were pending. As part of this analysis, the FAA also reviewed the individual cases of the Petitioners and made individual determinations that settlement was not warranted in these cases. The Agency embarked on the litigation analysis in order to best prepare its cases for hearing, not under any policy to settle cases. The cases selected for settlement were those whose examination demonstrated to the FAA that further litigation would not be successful.

Id. The Court of Appeals held the government need not give "detailed reasons" for its different treatment of some fired controllers. Although the Agency never

presented any evidence of any kind on this question, the court relied on the government's statement in its brief as "a sufficient explanation" for the difference in treatment between Petitioners and those controllers who were reinstated. Finally, the Court noted that the law favors settlement and that the "government is to be commended, not criticized," for settling cases it did not think it could win. Id. at 1578.

As to the question whether 5 USC § 7311 required Petitioners' removal for striking, the court found it unnecessary to decide that question since removal was within the range of permissible exercises of Agency discretion. Id. at 1579. The Court did not address the fact that the Agency never exercised its discretion in this case, because it believed firing Petitioners was mandatory under the statute.

The Court of Appeals' jurisdiction in this case was based on 5 USC § 7703, which provides for judicial review of decisions of the MSPB. The MSPB's jurisdiction over Petitioners' appeals from their termination decisions was based on 5 USC § 7513 (d) and § 7701.

REASONS FOR GRANTING THE WRIT

The Circuit Court's decision destroys the rule of equal treatment for government employees, therefore deciding an issue which has not been but should be directly decided by this Court.

After removing most of the nation's air traffic controllers from service, the Agency reinstated some controllers. The record contains uncontested evidence of these reinstatements[2] but no evidence of any kind

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[2] Abbott (Boeing Tower) vs. FAA, Master File, Tapp 1 Stipulation No. 38; Babcock (Sea-Tac Tower) vs. FAA, Master File, Tapp 3 Stipulation No. 38; Cady (Troutdale Tower) vs. FAA, Master File, Tapp 4 Stipulation No. 42.

to show why these controllers were reinstated. There was no contention that the cases of the reinstated controllers were factually any different from those of Petitioners. There was considerable evidence, for example, that reinstated controller Klapstein was striking, including testimony of supervisors and photographs of Mr. Klapstein on the picket line. Portland Transcript at 33, 203; Ex. LL, NN.

In response to Petitioner's contention at the hearing level that the reinstatement of some allegedly striking controllers violated the fundamental Merit Systems principle of equal treatment of employees, the presiding officials either ignored the issue (E.g. Arp vs. FAA, Initial Decision at 49-50, Presiding Official Teather), or held the contention moot on the ground that 5 USC § 7311 required removal of any striking employee. Bergh vs. FAA, Initial Decision,

74, n97 (Presiding Official Tapp).

On review, the MSPB relied on tort and commercial litigation cases to hold that evidence of a settlement is not admissible, therefore the government's burden to demonstrate the reasons for unequal treatment disappears in cases where that unequal treatment is by case settlement rather than by initial charge. Herbert (Seattle Tower) vs. FAA, 17 MSPR at 70.

The Federal Circuit modified the Board's decision somewhat, holding the Agency "was not required to give detailed reasons in each particular case" for discriminating between those controllers it reinstated and those it did not. Bergh, supra, 794 F.2d at 1577 (emphasis added). Though there was no evidence as to the government's reasons for reinstating some controllers, the Court accepted the Agency's statement in its brief that the Agency had carefully analyzed each

case and had made individual determinations to settle as a matter of litigation tactics. Id. The Court also cited a string of commercial litigation cases for the proposition that the "law favors settlement of cases" and held that the "government is to be commended, not criticized" for deciding not to litigate some controller cases. Id.

Thus, without evidence of any kind, and by the loosest analogy to cases entirely different on their facts, the Court has abrogated the principle of equal disciplinary treatment for federal employees. Under the Court's rule, an agency wishing to discriminate between two employees can make its decision unreviewable by adopting the simple expedient of applying the same initial discipline to both employees, then "settling" the litigation which arises therefrom with the favored employee.

The Court's decision violates the

fundamental principle of merit systems employment: equal treatment of similarly situated employees based on merit. Equal treatment has been basic to federal employment law under previous statutory schemes as well as under the 1978 Civil Service Act. E.g. Exec. Order 9830 of Feb. 24, 1947, Section 01.2 (d), 3 CFR 608 (1943-48) ("insure equitable and uniform treatment to employees against whom an adverse action is proposed."); 5 USC § 2301 (b)(2) ("fair and equitable treatment in all aspects of personnel management"); Federal Personnel Manual, Ch. 751, Subch. 1-2c (1)(2) (1976) (Agencies to be "as consistent as possible" in deciding discipline).

The MSPB has followed the principle of equal treatment in its cases, notably Douglas vs. Veteran's Administration, 5 MSPR 280, 306-07 (1981). The Board has also explained that the principle of equal treatment for

similarly situated employees further derives from the statutory requirement that arbitrary agency action be set aside. Id. at 301-03; 5 USC 7703 (c).

Petitioners are aware of no case in which this Court has specifically adopted the Board's requirement that discipline be administered equally to similarly situated employees. However, the principle is undisputed and indisputable under the applicable statutes and cases previously decided by the Board and the Federal Circuit, other than the cases of former air traffic controllers. Indeed, in Moseley vs. United States Postal Service, No. 86-815, (Fed. Cir. August 28, 1986), the Court of Appeals sent a case back to the Board for reconsideration in light of an arbitration award which had reinstated a similarly situated employee. The case arose out of a physical altercation between the two employees. The Court of

Appeals held Moseley entitled to consideration of the facts of the case and a decision whether there were grounds for treating him differently from his reinstated co-combatant. Petitioners in this case are entitled to the same consideration -- the same assurance of equal treatment. The Court's decision below would avoid the fundamental principle of equal treatment. The decision is important to federal employees in all agencies, and this court should grant review and reverse the Court of Appeals.

> The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings that its decision should be reversed.

The decision of the Court of Appeals below is based neither on evidence nor on legal reasoning. The Court's opinion is best characterized by its statement that "[t]he

government is to be commended, not criticized" for settling certain air traffic controller cases. Bergh, supra, 794 F.2d at 1578. The question below was not "commendation" or "criticism"; the question was affirmance, modification or reversal. The law requires the Federal Circuit Court of Appeals to review decisions of the MSPB for specific errors. 5 USC § 7703 (c). The Court of Appeals ignored these fundamental principles of judicial review.

The Federal Circuit accepted the principle enunciated by the Board in Douglas vs. Veteran's Administration, supra, that, in cases where disparate treatment is alleged, the Agency has the burden to show the reason for treating similarly situated employees differently. Douglas, supra, 5 MSPR at 307. The court sought to distinguish Douglas on the ground that this case involves disparate treatment at the litigation stage rather than

in the imposition of an initial penalty. 794 F.2d at 1577. Thus the Court held the Agency "was not required to give detailed reasons in each particular case". Id. at 4. The Court accepted the Agency's statement, made by counsel in its brief to the Court, that the cases were settled based on "an analysis of the strengths and weaknesses of each case".

Thus the Court has substituted for the requirement of evidence of reasons for disparate treatment an acceptance of an explanation in a brief by a lawyer. That "explanation" has absolutely no evidentiary value and was never considered by the presiding officials or by the Board, since it was never raised until counsel for the Agency put it forward in the Agency's brief to the Court of Appeals. Petitioners are unaware of any other instance in the law in which such a generalized and self-serving representation can serve to resolve the factual question on

which an entire case turns. It would be one thing (though completely insufficient) had an Agency witness made such statements under oath and subject to cross-examination at the hearing before the presiding officials. However, that did not happen. The Agency refused to provide any explanation during the course of these proceedings until it did so by way of argument in its brief to the Court of Appeals. The Court's acceptance of counsel's argument in the place of evidence of such a central and contested fact as the reason Petitioners were treated differently is far beyond any accepted judicial practice in any jurisdiction in the United States.[3] If the Federal Circuit Court of Appeals means to reverse decades of Civil Service practice and allow federal agencies to discriminate

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[3] E.g. Goldstein vs. Keller, 728 F.2d 32 (1st Cir. 1984); Hill vs. Trustees of Indiana University, 537 F.2d 248 (7th Cir. 1976).

among similarly situated employees without cause, it should do so by careful legal analysis, not by simultaneously abrogating basic principles of evidence and judicial review. The Court's decision should be reversed.

The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

This Court made clear in Securities Exchange Commission vs. Chenery Corp., 332 US 194, 67 S.Ct. 1575 (1946) that:

> A reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely on the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

332 US at 196; 67 S.Ct. at 1577.

The Agency took the position throughout the proceedings below that, under 5 USC § 7311, removal was the required penalty for any employee found to have engaged in striking. The Agency therefore never exercised its discretion to consider the applicable factors with respect to the appropriate penalty. It simply removed all of the Petitioners in this case because it believed that was the required result under § 7311. E.g. Bergh, supra (Portland Tower), Ex. 94 (Payne Deposition) at 137-38.

The Court of Appeals held in Schapansky vs. Department of Transportation, 735 F.2d 477 (Fed. Cir.) cert denied, 105 S.Ct. 432 (1984) that it would leave open the question whether § 7311 required removal of strikers because removal was a permissible penalty, within the Agency's discretion in cases of striking. Bergh, supra, 794 F.2d at 1579, quoting Schapansky at 485. Thus the Court's

application of the Schapansky rationale to this case brings the Court into direct conflict with Chenery, supra, on this record. There is no question at all on the record that the Agency never exercised its discretion on the question of the appropriate penalty for strikers. It simply dismissed all strikers on the ground that 5 USC § 7311 required it. The MSPB and the Federal Circuit therefore violated the rule of Chenery in affirming the Agency's discharge of Petitioners by purporting to uphold an exercise of discretion. There was no exercise of discretion to uphold. The basis for the Agency's decision was an interpretation of 5 USC § 7311 as mandatory, and the Court was required to review the Agency's decision on that basis. Instead, the Court has substituted its judgment for the Agency's discretion. This it may not do.

It cannot fairly be said that, had it

known it had discretion as to the penalty in this case, the Agency would have dismissed each of the Petitioners below. Petitioners were entitled to individual Agency consideration of the facts in their cases. They were denied this individual consideration by the Agency's decision as to the meaning of § 7311. The Court's affirmance on the basis that the Agency had discretion to fire Petitioners is a decision by the Court that, in the exercise of discretion, Petitioners would have been fired. This is a decision the Federal Circuit has no power to make on judicial review. 5 USC § 7703 (c).

Further, review should be granted because the reason for Petitioners' discharge requires a decision as to whether 5 USC § 7311 mandates the discharge of any government employee who engages in the conduct prohibited by that statute. No such decision

has ever been rendered by this Court, and the construction of that statute is a matter of great importance to large numbers of federal employees and former air traffic controllers.

CONCLUSION

The Court of Appeals, in its decision below, has ignored basic principles of judicial review and ordinary factual and legal requirements and has rendered a decision which nullifies the principle of equal disciplinary treatment for federal employees. The former air traffic controllers discharged in 1981 are entitled to the same careful and individual consideration as any other litigant. These Petitioners have not received that consideration. Because of the great significance of the Court's decision concerning equal disciplinary treatment for federal employees, and because of the radical

departure from accepted principles of judicial review practiced below, certiorari should be granted and the decision of the Court of Appeals reversed.

Respectfully submitted this 26th day of September, 1986.

IMPERATI, BARNETT, SHERWOOD & COON, P.C.

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James S. Coon

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Paul Drachler

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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APPENDIX A
Decision of the United States Court of Appeals for the Federal Circuit, issued July 2, 1986, affirming the decision of the Merit Systems Protection Board . . A-2

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

P.M. BERGH, et al.	)	No. 85-1102
MILTON. C. CROISSANT, et al,	)	No. 85-1103
LARRY L. JOHNSON, et al.,	)	No. 85-1106
JOHN C. HOLEN, et al.,	)	No. 85-1108
MYRON L. THOMASON, et al.	)	No. 85-1240
JOHN W. KARR, et al.,	)	No. 85-1241
STUART F. ETTER, et al.,	)	No. 85-1242
MELVIN L. BEEBE, et al.,	)	No. 85-1243
WILLIAM C. JOHNSON, et al.,	)	No. 85-1245
	)	
Petitioners,	)	
	)	
vs.	)	
	)	
DEPARTMENT OF TRANSPORTATION, FAA,	)	
	)	
Respondent.	)	

DECIDED: July 2, 1986

Before FRIEDMAN, SMITH, and BISSELL, Circuit Judges.

FRIEDMAN, Circuit Judge.

In this petition for review, former air traffic controllers challenge the decisions

of the Merit Systems Protection Board (Board) upholding their removal by the Federal Aviation Administration (Administration) for participating in the illegal 1981 strike on various grounds. A major contention is that the Administration acted improperly by reinstating other controllers whom it also had removed for striking but not reinstating the petitioners. We reject the petitioners' challenges to the decisions of the Board and affirm them.

I

Counsel for the petitioners requested oral arguments. We determined, however, that all but one of the issues the petitioners raised have been authoritatively decided in our previous decisions, that the facts and legal arguments were adequately presented in the briefs and record, and that the decisional process would not have been aided by oral argument. Fed. R. App. P. 34(a). We

heard oral argument on the issue whether the Administration acted improperly in reinstating some, but not all, of the fired controllers.

II

A. The parties stipulated that "[t]he FAA nationwide has reinstated some air traffic controllers/appellants who were removed for participation in the [air traffic controllers] strike pursuant to settlement agreement." The petitioners argue that the agency "violated MSPB principles and fundamental fairness by reinstating some controllers found guilty of striking, for no reason which can be discerned from the record." They cite Douglas vs. Veterans Administration, 5 MSPR 280 (1981), and Woody v. General Services Administration, 6 MSPR 486 (1981), for the proposition that "where an appellant raises an allegation of disparate treatment in comparison to

specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld." Woody, 6 MSPR at 488 (citing Douglas, 5 MSPR at 306-07). The petitioners assert that the agency "has provided no explanation, much less any evidence, as to why it vacated its findings and dismissed its charges against the reinstated controllers while denying petitioners this benefit."

Woody and Douglas, however, are inapposite because they deal solely with the question whether the penalty the agency selected was proper. The alleged disparate treatment here, however, does not involve any difference in the penalty imposed upon different employees -- all the air traffic controllers involved were removed -- but turns upon the propriety of the Administration's settling some of the cases

before the Board by reinstating some controllers, and not explaining the reason why it also did not enter into like settlements with the petitioners.

The agency has given the following explanation in its brief of the process by which, and the reasons why, it determined to settle some of the cases but not those of the petitioners:

> The FAA conducted an in-depth analysis of each of the 110,000 cases of the removed air traffic controllers in preparation for the litigation before the MSPB. As part of the litigation strategy, the FAA undertook an analysis of the strengths and weaknesses of each case. Based on this individualized analysis, the agency made decisions to enter into settlement negotiations with certain air traffic controllers whose appeals were pending. As part of this analysis, the FAA also reviewed the individual cases of the petitioners and made individual determinations that settlement was not warranted in these cases. The agency embarked on the litigation analysis in order to best prepare its cases for hearings, not under any policy to settle cases. The cases selected for settlement were those whose examination demonstrated to the FAA that further litigation would not be

successful.

We know of no principle that precludes the government from settling, upon whatever terms it deems suitable, cases in which it determines that the likelihood of success is so low as to make continued litigation inappropriate. The decision whether to settle a particular case and upon what terms is a matter particularly within the discretion of the agency conducting the litigation. The agency was not required to give detailed reasons in each particular case concerning the facts that led it to settle rather than to litigate, as the petitioners apparently would require it to do. The agency's statement that based upon "an analysis of the strengths and weaknesses of each case," it decided not to conduct "further litigation" of those cases where the analysis indicated that such litigation "would not be successful," was a sufficient

explanation for the settlements the government made.

The Law favors settlement of cases. United States v. Contra Costa County Water District, 678 F.2d 541, 565 (6th Cir. 1982); Airline Stewards & Stewardesses Association, Local 550, TWU, AFL-CIO v. American Airlines, 573 F.2d 960, 963 (7th Cir. 1978); Florida Trailer & Equipment Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960); Fed. R. Evid. 408 advisory committee note. The government is to be commended, not criticized, for deciding not to litigate those of the vast number of air traffic controller cases pending before the Board in which it concluded that its likelihood of success was so small as to make continued litigation unwise.

B. The petitioners next contend that the Administration denied them equal protection because, due to friendship or personal favoritism, Administration officials

notified other air traffic controllers, but not the petitioners, of their deadline shift for reporting to work. They rely upon Olshock vs. Village of Skokie, 411 F.Supp. 257 (N.D. Ill.), aff'd, 541 F.2d 1254 (7th Cir. 1976). In Olshock, during a police officers strike the Village of Skokie took an informal poll to determine which officers might return to work. Those who said they would do so were notified that if they reported by a specific date, they would not be discharged, but merely suspended. The court held that.

> [t]he failure of the defendants to give all the 59 striking policemen notice that they would not be discharged if they reported for duty in uniform on or prior to July 13, 1975, and the failure of defendants to give said notice to the plaintiffs herein, constituted a failure to provide equal protection under the laws to plaintiffs within the meaning of and as required by the Fourteenth Amendment to the United States Constitution....

Id. at 265.

The rationale of Olshock was that the Village unfairly had discriminated against those officers who were not notified that if they reported by the deadline, they would not be discharged, in favor of those who were notified. In that situation, the non-notified officers were not aware of the deadline and the consequences of failing to meet it. The air traffic controllers, however, were in a quite different situation, for we have held that

> [e]ach petitioner knew when his next regularly-scheduled shift commenced and elected not to show up at that time. Having disregarded the initial 48 hour moratorium, petitioners can hardly complain that they were not specifically and personally notified that each had an opportunity to also disregard an extension of that moratorium.

Adams v. Department of Transportation, FAA, 735 F.2d 488, 491 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984).

The petitioners argue, however, that even if the Administration was not required

to notify all the air traffic controllers of their deadline shifts, it could not selectively notify some ut not others. The petitioners point out the Mr. Helms, the administrator of the agency, issued a "directive" that supervisors should encourage their friends to come back to work.

The Helms statement, however, did not relate to notifying controllers of their deadline shifts, but only urged supervisors to encourage controllers with whom they were friendly to return to work. In his testimony Mr. Cox, a supervisor at one of the towers involved, explained the scope and purpose of the Helms statement:

> Q Now in this telecon, Mr. Helms advised that he did not want supervisors to be calling controllers as supervisors, is that right?
>
> A That was not a directive. He suggested that the Agency--he said the Agency was not going to instruct supervisors to make calls as supervisors to their people.

Q So he said that as far as the Agency's position was concerned, as a supervisor you were not being directed to call--

A That's correct.

Q Controllers, is that correct? But he did say that the Agency was suggesting that supervisors call controllers as personal friends?

A I think that's a little liberal. My interpretation of what I heard was that if you felt, and if you were concerned about these people as friends--he wasn't suggesting to call everybody as a friend. What he was saying is that if you had someone you were especially concerned about as a friend, that you could be influential with and answer questions, go ahead and give him a call.

C. The petitioners argue that the Administration "erroneously decided that 5 USC Section 7311 require d dismissal of any employee found guilty of striking," whereas that statute permitted the agency to impose a lesser penalty. We rejected a similar contention in Schapansky v. Department of Transportation, FAA, 735 F.2d 477 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984),

where we ruled that

> [w]hether removal is mandatory under 5 USC § 7311 or 18 USC § 1918 need not be here decided. Removal is permissible under those statutes and no statute prohibits removal of any who strike against the United States.

Id. at 485.

Similarly, in the present case we cannot find that the Administration abused its discretion or otherwise acted improperly in concluding that the appropriate penalty for the petitioners' illegally striking against the government was removal.

D. Two of the petitioners (Burkett, No. 85-1102, and Johnson, No. 85-1245) contend that their failure to report for work resulted not from participation in the strike but because they were confused about their deadline shift for reporting. We have rejected similar claims in Anderson v. Department of Transportation, FAA, 735 F.2d 537 (Fed. Cir.) cert. denied, 105 S.Ct. 432

(1984); Adams vs. Department of Transportation, FAA, 735 F.2d 488 (Fed. Cir.,), cert. denied, 105 S.Ct. 432 (1984); and Dorrance v. Department of Transportation, FAA, 735 F.2d 516 (Fed. Cir), cert. denied, 105 S.Ct. 432 (1984). For the reasons given in those opinions, we also reject the claim here.

The decisions of the Merit Systems Protection Board upholding the removal of the petitioners are affirmed.

AFFIRMED

APPENDIX B

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

WILLIAM P. HERBERT, ET AL.[1/] (Seattle Center)	)	
v.	)	DOCKET NUMBER SE075281FO536
DEPARTMENT OF TRANSPORTATION, FAA,	)	

OPINION AND ORDER

Appellants[2/] petitioned the Board's Seattle Regional Office for appeal of their removals from employment as Air Traffic Control Specialists at the Seattle Air Route Traffic Control Center (Seattle Center) for participating in an illegal strike and being absent without leave (AWOL) on various dates in August 1981. The presiding official affirmed the removals with respect to 38 appellants. As to appellant William C. Johnson, the presiding official reversed the

removal, sustained the AWOL charge, and mitigated the penalty to a three-day suspension. The presiding official also ordered the agency to cancel the constructive suspensions which he found had been imposed on all appellants during the removal notice period.

Appellants have filed a consolidated petition for review and a supplemental petition.3/ The agency has opposed the petitions and has filed cross-petitions for review seeking reversal of the presiding official's order cancelling the constructive suspensions in all cases and reversing the removal of appellant William Johnson. The Board hereby GRANTS the petitions for review under 5 USC § 7701(e)(1).

Appellants first assert that the agency's failure to notify them of their respective deadlines constituted harmful error. They claim they were confused by the

public announcement of President Reagan concerning their employment status and probably would have returned to work had they known their actual deadlines.4/ The presiding official found that the failure to return within one's deadline, although not explicitly charged, was a material element of the agency's charge of strike participation and that, therefore, the agency erred in failing to notify appellants of their deadline shifts. However, he found that 38 of the appellants did not prove that the agency's error was harmful. In Anderson vs. Department of Transportation, MSPB Docket No. SL075281F0347 at 7-8 (April 25, 1983), the Board held that a former air traffic controller's deadline shift, or notification of that deadline, is not an element of the strike charge and that a showing of confusion with respect to such deadline shift therefore does not rebut the agency's prima facie case

of strike participation.

Moreover, in Campbell v. Department of Transportation, MSPB Docket No. DEO75281FO674 at 15-16 (April 25, 1983), we held that, despite any ambiguities and uncertainties caused by the President's announcement or statements by agency officials regarding a former air traffic controller's employment status, an appellant was required to timely notify the agency of his readiness and desire to return to work in order to have availed himself of the Presidential amnesty offer. We also found that it was incumbent on the former employee to seek any necessary clarification from the agency with respect to his individual deadline shift. We specifically rejected the contention that the appellant was relieved of those responsibilities based on his allegations of confusion regarding his individual deadline and employment status, and ensuing belief

that he already had been discharged.

The Board finds, therefore, that the presiding official erred in finding that the agency's failure to notify appellants of their deadline shifts was error. Moreover, any such error would not affect the removals as to 38 of the 39 appellants before the Board in this case.

The presiding official found that appellant William C. Johnson demonstrated that he was harmed by the agency's failure to notify him of his deadline shift. He therefore reversed the removal action. The presiding official found, however, that appellant was AWOL one day and mitigated the penalty to a three-day suspension. The Board finds that the presiding official's findings as to appellant Johnson are inconsistent with Anderson and Campbell. The agency proved the charges of strike participation and AWOL by preponderant evidence, appellant did not

prove harmful error by the agency in the application of its procedures, and the penalty of removal is appropriate and promotes the efficiency of the service. Therefore, the Board hereby REVERSES the presiding official to the extent that the agency's removal of appellant Johnson is hereby SUSTAINED.

Appellants next argue that the agency's failure to specify their deadlines in the notices of proposed removal violated their due process rights. They also contend that the agency's notification of selected appellants regarding the deadline violated equal protection requirements. These assertions lack merit because as discussed, supra, neither the deadline shift nor notification of that deadline is an element of the strike charge. See Anderson, supra, and Campbell, supra.

Appellants allege that the agency failed

to establish a prima facie case of strike participation. They argue specifically that the presiding official erred in assigning probative value to the watch schedules and the time and attendance reports submitted by the agency because these documents were "so seriously flawed" that they provided no basis to establish unauthorized absence.

The presiding official considered appellants' attack on the reliability and sufficiency of these documents in his initial decision and found that the few inaccuracies and discrepancies demonstrated during the hearing did not justify excluding the watch schedules on a wholesale basis. He concluded that in the absence of material discrepancies or inaccuracies in an individual case, the time and attendance records and the watch schedules were generally sufficient, taken together, to establish a prima facie case of a controller's schedule and his failure to

appear as scheduled.

The Board finds that the presiding official did not abuse his discretion in admitting and assigning probative value to the documents submitted by the agency. See Jackson v. Department of the Army, MSPB Docket No. AT07528118273 (February 3, 1982); Borninkhof v. Department of Justice, 5 MSPB 150 (1981). Further, the Board concurs with the presiding official's finding that the agency presented sufficient evidence to establish a prima facie case of strike participation. See Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 at 6 n.2 (October 28, 1982). The Board notes that in addition to the documents, the parties stipulated that the facility chief would have testified that an appellant's duty status was as shown on the watch schedule and that any shift changes were marked by an asterisk thereon. See

Herbert Master file, Tab 29, Stipulation Nos. C-3(b; and (d). Therefore, the Board finds that Appellants' argument in this regard is without merit.

In addition to the general argument of error by the presiding official in this regard, appellants raise fact-specific arguments with respect to the following two appellants.

Appellant Theodore Mapile contends that the presiding official erred in finding that he was absent without leave on August 5 because his scheduled noon shift on August 5 is marked out on the watch schedule. The presiding official considered the watch schedule and the time and attendance report, the fact that appellant did not appear for either of his scheduled shifts on August 4 or 5, was not on approved leave, and did not contact the facility to explain his absences and found that the agency established a prima

facie case of strike participation on those dates. We agree. Furthermore, appellant never claimed before the presiding official that he was not scheduled for a noon shift on August 5. The presiding official considered this in his findings. See Initial Decision (I.D.) at 54 n.71. The Board finds no reason to disturb the presiding official's conclusions. See Weaver v. Department of the Navy, 2 MSPB 297-299 (1980).

Appellant Wayne H. McCormick alleges that he had no legal duty to report for work on August 5 since that was usually his regular day off (RDO) and he never requested nor was he ever notified the his RDO was cancelled. The watch schedule for August 5 shows "RDO-1" crossed out and "08" written in next to the initials "CZ." THe presiding official acknowledged that the document raised significant questions regarding appellant's schedule on August 5 and that the

agency should have called as a witness Clyde Zumwalt who controlled the change in work schedule. Still, the presiding official found the agency's theory more credible than appellant's and concluded that appellant participated in an illegal strike on August 3, 4, and 5. See I.D. at 57-61. We can find no reason to disturb the presiding official's findings in this regard. See Weaver, supra.

Appellants argue generally that the agency failed to prove the charges by the requisite burden of proof. This argument is without merit. The presiding official, applying Schapansky, supra, properly found that appellants were absent without leave during the strike, that appellants failed to rebut the agency's case, and that the agency proved the charges by preponderant evidence.5/

Appellants allege specifically that the agency failed to prove the charge of strike

participation as to appellants Jon Fallstrom, Clifford Hooper, James Limric, and David Michael. Appellants set for the facts regarding the particular situations of these appellants. The Board notes that the presiding official considered the same facts at length in his initial decision and found that the agency proved the charges in each instance. Appellants merely disagree with the presiding official's findings. The Board can discern no error in the presiding official's findings. Therefore, we defer to his conclusions. See Weaver, supra.

Appellants next contend that the presiding official abused his discretion in failing to consider a penalty less than removal. The presiding official found that 5 USC § 7311 mandates removal as a penalty once an agency decides to take an adverse action against an employee for striking. In Schapansky, supra, at 9, we did not decide

whether as a matter of law, mitigation of the penalty is foreclosed under § 7311(3). The Board considered certain potentially mitigating factors and found them to be insufficient to warrant reduction of the removal penalty imposed on a striking air traffic controller.

Appellants argue that factors not considered in Schapansky apply in their cases and that the presiding official erred in failing to consider them. The potentially mitigating factors appellants now raise are of the same general nature as those considered and found insufficient to warrant reduction of the removal penalty in Schapansky.[6/] Appellants, however, also allege disparate treatment as a mitigating factor under Douglas v. Veterans Administration, 5 MSPB 313,331-32 (1981), which was not considered in Schapansky and contend that it is sufficient to reverse the

removals.7/ Appellants argue that other controllers initially removed for participating in the 1981 strike were later reinstated pursuant to settlement agreements. They argue that this amounted to disparate treatment in violation of principles established by the Board in Douglas v. Veterans Administration, 5 MSPB 313, 332-333 (1981), and Woody v. General Services Administration, 6 MSPB 410 (1981).

In his initial decision, the presiding official found that appellants' disparate treatment contention was mooted by his finding that 5 USC § 7311(3) mandates removal. The presiding official relied on Woody, supra, at 411, wherein the Board held that where the statutory penalty is mandatory, the Board cannot order a lesser penalty even if the agency has failed to comply with the statute in other cases.

Appellants in this case and those with

whom they seek comparison were all air traffic controllers, albeit at different facilities, removed for participating in an illegal strike. Therefore, the agency imposed the same penalty in each instance. The record reflects, however, that some controllers initially removed for striking were reinstated pursuant to settlement agreements.[8/] The agency acknowledged that two air traffic controllers in the Seattle region who were initially removed for strike participation were later reinstated pursuant to settlement agreements. See the record in Ackley v. Department of Transportation, MSPB Docket No. SE075281F0445, Appellant's Exh. 608.

In Schapansky, supra, the Board found that the nature and gravity of the offense of strike participation by a person in the sensitive position of air traffic controller, and the direct effect of that participation

on the agency's ability to perform its mission, far outweighed such potentially mitigating factors as length of government service and a flawless prior employment record. The Board concluded that the agency's imposition of a removal penalty on such an air traffic controller could not be deemed clearly excessive or disproportionate to a sustained charge of striking against the Federal government. The Board finds similarly here that disparate treatment is not a sufficient mitigating factor. The penalty of removal imposed on appellants by the agency is not unduly harsh and promotes the efficiency of the service. Cf. Otherson v. Department of Justice, No. 82-1991, slip op. (D.C. Cir. June 21, 1983) (suggests that if the misconduct warrants the penalty, the penalty is appropriate despite disparity in treatment).

The Board notes further that public

policy strongly favors compromise and the settlement of disputes. In re King, 3 MSPB 29 (1980). The courts have held that evidence of offers to settle and the terms of a settlement are inadmissible to demonstrate liability on the part of the party making the offer. Overseas Motors, Inc., v. Import Motors Ltd., Inc., 375 F.Supp. 499, 536-537 (E.D. Mich. 1974), aff'd, 519 F.2d 119 (7th Cir.), cert. denied, 423 US 987 (1975). This exclusion extends to evidence concerning settlement negotiations with third parties. United States v. Contra Costa County Water District, 678 F.2d 90, 92 (9th Cir. 1982); Burns v. City of Des Peres, 534 F.2d 103, 112 (8th Cir.), cert. denied, 429 US 861 (1976); City of Groton v. Connecticut Light and Power Co., 84 FRD 420, 422-423 (D. Conn. 1979). by preventing settlement offers and negotiations from being admitted into evidence, courts hope to encourage free and open negotiation

thereby furthering the policy toward settlements. Burns, 678 F.2d at 92.

In this case, appellants attempt to probe the facts and circumstances of the settlement agreements between the agency and other controllers in an effort to reverse their removals. The Board finds that the chilling effect such a probe would have on settlement agreements outweighs appellants' need for disclosure.

Appellants maintain that the cumulative effect of agency and presiding official errors provides a basis for reversal. They also argue that the agency's failure to exercise discretion in the mass removal of striking controllers did not promote the efficiency of the service. The presiding official considered and rejected these arguments in his initial decision. We can find no reason to disturb his conclusions.

Appellants also allege that they

preserve all issues argued at the Regional Office level even though not further argued in their petitions for review.[9/] Since appellants have presented no new arguments to disturb the findings made by the presiding official as to these issues, the Board defers to his findings.

Finally, appellants argue that prevailing appellants are entitled to attorney fees. This argument is moot since there are no prevailing appellants in this consolidated group. If there were, however, they must follow the regulatory procedures for requests for payment of attorney fees. See 5 CFR § 1201.37(a).

Having considered all of the arguments concerning the agency's removal of appellants,[10/] the Board now considers the agency's petition fore review of the suspension action. The agency argues that the presiding official erred in finding that

appellants were improperly suspended during the removal notice period. The agency first contends that the Board lacked jurisdiction to review the suspension claims because a suspension claim constitutes the basis for a separate appeal and was not timely raised.

The Board has recently held in Smith v. Department of Transportation, MPB Docket No. DE07581F0337 at 6-7 (August 24, 1983), that the regulatory filing deadline for raising claims for constructive suspension will be waived under the unique circumstances of these related appeals if they are raised at the hearing on appeal or otherwise before the record is closed, in the absence of a showing of prejudice to the agency in defending its action. See 5 CFR § 1201.12.

In this case, the presiding official found that the suspension claim was raised early in the discovery process in appellants' statement of facts and issues and that the

claim was fully explored at the hearing. He found that the agency could not justifiably claim surprise. We note further that the agency did not even allege any prejudice in defending its action due to the suspension claim not being raised in appellants' petitions for appeal. We therefore find the agency's argument in this regard to be without merit.

The agency argues that the presiding official erred on the merits of the suspension issue. The agency contends that appellants were not suspended but were simply not paid because they were voluntarily absent without leave. In Martel v. Department of Transportation, MSPB Docket No. BN07528lF0558 at 6-7, 11-12 (April 25, 1983), the Board held that in order to meet his burden of establishing jurisdiction over an alleged suspension during the notice period under 5 CFR § 1201.56(a)(2), an appellant must prove

by preponderant evidence that the action was involuntary and disciplinary in nature, and that the employee was ready, willing, and able to work during the period of time in question. The last of the three criteria cannot be established without evidence that the appellant contacted an agency official with decision-making authority, in person or otherwise, and unequivocally notified the official that he was ready, willing, and able to return to work. Id. at 11. Such a showing effectively establishes, without additional evidence, that the agency's action or inaction in continuing to maintain appellant in a nonduty, nonpay status during the notice period was involuntary on appellant's part and disciplinary in nature on the agency's part. Id. at 12.

We have reviewed the record and find that only appellant David T. Michael meets the test for an unlawful suspension which the

Board has articulated in Martel.11/ The record reflects that appellant Michael called the facility on August 11, four days after his deadline, and stated that he wanted to return to work. Hearing Transcript (H.T.) V at 60, 79-80. He was told by Lois A. Bushey (title given as "PMS") that it was too late. See Agency file, Tab 3. However, appellant testified that Ms. Bushey set up an appointment for appellant with the facility chief. Id. at 60. Appellant testified that at the meeting on August 12, he asked to return to work. Id. at 61. The facility chief also testified concerning his meeting with appellant. He acknowledged that appellant stated that he wanted to return to work, that he did not put appellant back, and that appellant remained in a nonduty status until his removal. H.T. I at 63.

The Board finds that appellant Michael was ready, willing, and able to work on

August 12, 1981. The agency's maintenance of appellant in a nonduty, nonpay status after that date was involuntary on appellant's part and disciplinary on the agency's part. Therefore, the Board finds that appellant Michael was suspended from August 12 through October 15, 1981,[12/] and that the suspension constituted an appealable adverse action under 5 USC §§ 7501(2), 7512(2), and 7513(d). The initial decision dated January 25, 1983, is thus hereby AFFIRMED as to appellant Michael's suspension.

Accordingly, the following summarizes the Board's disposition of these appeals on petition for review:

The initial decision is REVERSED as to appellant William C. Johnson. Appellant Johnson's removal is hereby SUSTAINED. The initial decision is AFFIRMED as MODIFIED with regard to the removal of the remaining appellants in this consolidated group and

their removals are hereby SUSTAINED.

The initial decision is AFFIRMED as MODIFIED as to appellant David Michael. Appellant Michael's suspension from August 12 though October 1, 1981, is NOT SUSTAINED. The initial decision is REVERSED as to its finding o the suspension of the remaining appellants in this consolidated group, and the agency's maintenance of these appellants in a nonduty, nonpay status during their removal notice period is not deemed to be before the Board.

The agency is hereby ORDERED to amend its records so as to place appellant David Michael in a pay status from August 12, 1981, to October 15, 1981, the effective date of his removal. Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within twenty (20) days of the date of issuance of this Opinion. any petition for enforcement

of this Order shall be made to the Seattle Regional office in accordance with 5 CFR § 1201.181(a).

This is the final order of the Merit Systems Protection Board in these appeals. 5 CFR § 1201.113(c). Each appellant is hereby notified of the right under 5 USC § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after appellant's receipt of this order.

FOR THE BOARD:

Sept. 29, 1983
(Date)

Robert E. Taylor
Secretary

Washington D.C.

Attachment: Statement of the Board's policy on service of its opinions and orders.

1. This is one of several groups of appellants consolidated by facility under the lead case name of Herbert at the Regional Office level. For purposes of administrative expediency and efficiency, the Board is recaptioning each of the six Opinion and Orders in these cases to reflect the name and docket number of an appellant in the particular group and the facility where the group was employed.

2. The 39 appellants included in this consolidation are identified by name and docket number in Appendix I attached to this Opinion and Order. Thirty-seven are represented by the law firm of Gibbs, Douglas, Theiler, and Drachler of Seattle, Washington. After the petition for review was filed, the law firm withdrew as attorneys for Marvin Johnson and Ronald Orton.

3. By Order dated March 3, 1983, the Board granted a motion by attorneys Paul Drachler of Gibbs, Douglas, Theiler, and Drachler, and Samuel Imperati of Welch, Bruun, and Green to permit the filing of a consolidated petition for review and supplemental petitions by facility for their approximately 200 clients whose appeals were adjudicated by two presiding officials in the Seattle Regional Office in 17 separate initial decisions.

4. On August 3, 1981, at approximately 11 a.m. Eastern Daylight Time (EDT), President Reagan, after stating that an air traffic controller strike was in progress, announced that if air traffic controllers did not report for duty within 48 hours, they would "have forfeited their jobs and will be terminated." 17 Weekly Comp. Pres. Do. 845 (1981).

5. The presiding official found that the agency would not allow a controller to return to duty after his deadline shift. Therefore, he did not make any findings as to whether appellant was striking or AWOL after his deadline shift even though charged in the removal notice to the date of the notice which in some instances included later dates. We have found no reason to disturb the presiding official's findings that the agency proved the charges as to each appellant on at least one date charged. Therefore, we need not consider additional dates. See Baracco v. Department of Transportation, MSPB Docket No. DC075281F0895 at 5 (April 25, 1983).

6. Appellants list the factors set out in Douglas v. Veterans Administration, 5 MSPB 313, 332-333 (1981).

7. Appellants do not allege any prohibited personnel practice described in 5 USC § 2302(b).

8. See the records in Abbott (Boeing Tower) v. Department of Transportation, MSPB Docket No. SE075281F0625, Master File, Tab 1, Stipulation No. 38; Babcock (Sea-Tac Tower) v. Department of Transportation, MSPB Docket no. SE075281F0637, Master File, Tab 3, Stipulation No. 38; Cady (Troutdale Tower) v. Department of Transportation, MSPB Docket No. SE075281F0445, Master File, Tab 4, Stipulation No. 42.

9. Such issues include the denial of pretrial motions, the exclusion of certain evidence offered by appellants, the denial of trial motions and motions in limine, and exceptions to evidentiary rulings.

10. The Board has resolved the remaining issues raised by appellants in their petitions for review in the following cases: Ketcham v. Department of Transportation, MSPB Docket No. DA075281F0713 at 9 (May 28, 1982), motion for clarification denied (November 23, 1982) (official notice of the existence of an unlawful strike); Noa v. Department of Transportation, MSPB Docket No. NY075281F0697 at 12-13 (April 25, 1983) (concerted action for purposes of strike participation and strike continuation); Schapansky, supra, at 7-8 (invocation of 5 USC § 7513(b)(1) to shorten the notice period); Anderson, supra, at 8-13 (meaningful opportunity to reply to removal notice); Baracco, supra, at 8-9 (response required "within" 7 calendar days).

11. The record reflects that 33 appellants did not contact the agency after they failed to appear for their deadline shifts. Appellants Richard E. McVay, Thomas O. Miller, and Larry A. Parker called the facility but not to request to return to work. See mcVay Skeleton file, Tab 5; Miller Skeleton file, Tab 5. I.D. 78 n.94.

12. Appellant's first notice of proposed removal dated August 10, 1981, was later rescinded. Appellant was issued a second notice dated September 15. The decision to remove letter dated October 5 notified appellant that he was to be removed October 15, 1981.